No. 86-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRY E. BECK, JR., *et alia*,

Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA *et alia*,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners Harry E. Beck *et alia* hereby reply to the memorandum of respondent Communications Workers of America (CWA).

ARGUMENT

Both of CWA's contentions that the instant petition "does not merit plenary consideration * * * at this time" [1] border on the ridiculous.

First, CWA charges that petitioners "are asking this Court to decide in the *first instance* questions that were

[1] Memorandum of the Respondent (M) at 1.

not presented to any court below. That is not the role of this Court".[2] Exactly the opposite is true. The issue of the procedural adequacy of the remedy for CWA's violation of Section 8(a)(3) of the National Labor Relations Act was squarely presented to, *and decided by*, the panel of the Court of Appeals.[3] Moreover, in rendering that decision, the panel explicitly rejected petitioners' arguments based on *Hudson* v. *Chicago Teachers Union, Local No. 1*.[4]

Even CWA would not dare to argue that, had this Court never decided *Hudson*, the Court would somehow be impotent to hear petitioners' argument that the Seventh Circuit's decision in *Hudson* demonstrates the erroneous nature of the decision of the Fourth Circuit's panel on the procedural issue. Why this Court's *affirmance* of the Seventh Circuit suddenly creates an impediment to its consideration of this case CWA never explains. Indeed, one would presume that this Court's unanimous support for the Seventh Circuit's decision would strongly counsel the *practical necessity*, not simply the propriety, of plenary review here.

CWA's further canard that petitioners "*did not request reconsideration* [en banc] *of the panel's remedial decision*"[5] is, of course, irrelevant. Seeking reconsideration *en banc* of a decision of a Court of Appeals' panel is not a condition precedent to review by this Court of the panel's decision.

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[2] *Id.* at 4.

[3] Appendix in No. 86-966, at 81a-83a.

[4] 743 F.2d 1187 (7th Cir. 1984), *aff'd*, ____ U.S. ____, 106 S. Ct. 1066 (1986).

[5] M at 4.

Second, CWA complains that "it is impossible to discuss in a reasoned way what procedural requirements CWA must meet in collecting agency fees until it is first determined whether any substantive constraints are placed on CWA in this regard."[6] To be sure, if this Court decides that *no* "substantive constraints" may be imposed on Section 8(a)(3) "agency-fee" schemes, then it will also decide *a fortiori* that there are *no* "procedural requirements [that] CWA must meet", either. And, in that case, no further discussion will be necessary. One cannot, however, simply *assume* that CWA will prevail on the "substantive-constraints" issue. After all, it lost *en banc* in the Court of Appeals. If CWA also loses on that issue here, then necessarily the issue before this Court will be whether the panel was correct in holding that petitioners are not entitled to a *Hudson*-type remedy for CWA's breach of those constraints. If CWA imagines that the content of any conceivable "procedural requirements" varies significantly depending on the mere *basis* of the "substantive constraints"—that is, whether the constraints arise from Section 8(a)(3) itself, from the duty of fair representation, or from the First Amendment—nothing prevents CWA from so arguing.

Petitioners believe that: *1.* The language of Section 8(a)(3) itself imports certain "procedural requirements" as conditions *sine qua non* to the enforcement of an "agency-fee" arrangement. *2.* These "procedural requirements" embody the same common-sense standards to which this Court referred in *Hudson* when it stated that, constitutional considerations aside, "[b]asic considerations of fairness * * * dictate that potential objectors

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[6] *Id.* at 2.

[*i.e.*, nonunion employees such as petitioners] be given sufficient information to gauge the propriety of the union's fee".[7] *3.* These standards compel CWA to provide nonunion employees with the "notice of and opportunity for hearing upon its proposed action" that this Court held the duty of fair representation requires.[8] And *4.*, if common sense, the statute, and the duty of fair representation do not impose the rudimentary safeguards of notice and hearing on CWA's "agency-fee" scheme, then surely the First Amendment does. That is, *whatever* the *source* of the "substantive constraints", the "procedural requirements" necessary to make those constraints effective are the *same*. And, in petitioners' view, the issue before this Court in No. 86-966 is, not "What is the source of the constraints?", but rather "What procedures are required to enforce the constraints, whatever their source?". Moreover, in deciding what the "substantive constraints" are in No. 86-637, this Court will largely determine the procedural requirements necessary to effectuate them—because the precedents governing, and indeed the common sense of, the matter on the substantive side lead to but one reasonable conclusion on the procedural side, too.

Finally, CWA's suggestion that the instant petition (No. 86-966) "be held pending a decision on CWA's * * * petition" (No. 86-637)[9] merely amounts to a demand to permit CWA to prevail in a practical sense not only if it wins on the merits of the "substantive-constraints" issue, but also *even if it loses on that issue*. For, according to

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[7] 106 S. Ct. at 1076.

[8] Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944).

[9] Id at 7.

its desires, if CWA loses petitioners nevertheless "should be remanded to the appellate court for decision" on the application of *Hudson* to the issue of what procedural requirements are appropriate—even though the appellate court has already rejected the applicability of the principles of *Hudson* under the circumstances of this case; even though the instant petition is timely and properly raises the procedural issue; and even though that issue is intimately related to, if not logically inextricable from, the "substantive-constraints" issue CWA admits this Court should decide.

Besides needlessly consuming the courts' and the parties' resources in this case, CWA's suggestion would prevent this Court from obviating further costly litigation in other cases on what "procedural requirements" are mandatory for "agency-shop" arrangements under Section 8(a)(3). It passes understanding why this Court should not settle that question now, *once and for all throughout the United States*, simultaneously with settlement of the issue of what the "substantive constraints" are under that section.

CONCLUSION

For the foregoing reasons, this Court should issue writs of certiorari in *both* No. 86-966 *and* No. 86-637,

and order the two cases consolidated for briefing and oral argument.

Respectfully submitted,

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